

AGENDA

State of Wisconsin
Livestock Facility Siting Review Board
Teleconference Meeting

May 12, 2008
DATCP, Room 266
2811 Agriculture Drive, Madison

- 12:00 a.m. CALL TO ORDER—Jim Holte, LFSRB Chair
- Open meeting notice
 - Approval of agenda
- 12:10 a.m. *Ronald S. Stadler v. Crawford County, Docket No. 08-L-01*—Cheryl Daniels
- Discuss pre-hearing matters including motions to file amicus curiae briefs
- 12:50 p.m. Board schedule and future agenda items
- Next meeting—May 16, 2008
- 1:00 p.m. ADJOURN

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD

Ronald S. Stadler, et al.

v.

Docket No. 08-L-01

Crawford County

**REQUEST FOR LEAVE TO FILE AMICUS BRIEF OF
THE WISCONSIN FARM BUREAU FEDERATION, COOPERATIVE,
THE WISCONSIN PORK ASSOCIATION, COOPERATIVE, AND
THE WISCONSIN CATTLEMEN'S ASSOCIATION**

The Wisconsin Farm Bureau Federation, Cooperative, the Wisconsin Pork Association, Cooperative, and the Wisconsin Cattlemen's Association respectfully request leave from the Livestock Facility Siting Review Board to file an Amicus Brief advocating that the Board reconsider and correct its April 18, 2008 preliminary decision in the above-captioned appeal. Pursuant to the Bylaws of the Board,¹ a statement as to the interest of the parties and the reasons for the request are provided below.

STATEMENT OF INTEREST

A. The Parties Requesting Leave to File an Amicus Brief.

The Wisconsin Farm Bureau Federation, Cooperative (the "Farm Bureau") is a voluntary organization controlled by its members who are active farmers. It was formed in 1920 for the purpose of improving the economic and educational position of Wisconsin farmers and their political effectiveness. It has approximately 40,000 members and is the largest general farm organization representing Wisconsin's farmers. The Farm Bureau serves in a leadership role on behalf of all segments of agriculture in Wisconsin, including livestock farming, and focuses primarily on educational and lobbying efforts for the benefit of its members and the general public.

¹ Wisconsin Livestock Facility Siting Review Board Bylaws, Appendix A, Section B, No. 5 (page A-4).

The Wisconsin Pork Association, Cooperative (the "WPA") was formed in 1967 to represent the interests of pork producers across Wisconsin. Its members consist of pork producers, others interested in pork production, and local associations throughout the State of Wisconsin. The WPA provides consumer information and conducts product promotions to increase demand for pork products and awareness of the pork industry, and supports research and lobbying projects for the enhancement of the pork industry.

The Wisconsin Cattlemen's Association (the "WCA") was formed in 1970 as the successor to an association formed in the 1950s. It was formed for the principal purposes of providing leadership, representation, and support for the beef industry by supporting education, research and youth programs, recommending legislation and promoting beef consumption and product development. The WCA's members consist of cattle producers and others interested in Wisconsin's beef industry. Together with the affiliate organizations which have representation on the WCA board, approximately 80 percent of Wisconsin's beef producers are represented by the WCA.

Representatives of Farm Bureau, WPA, and WCA (collectively, the "Ag Coalition") and their members have had a key role in the promulgation and enactment of Wisconsin's livestock siting laws, Wisconsin Statute Section 93.90 and Wisconsin Administrative Code ATP Chapter 51.

B. The Importance of the Livestock Siting Laws to the Ag Coalition.

The application of the livestock siting laws is of vital importance to the livelihood of the members of the Ag Coalition. Many of these members raise livestock to earn their livings. The Ag Coalition has a direct interest in ensuring that the livestock siting laws are applied accurately and uniformly, thereby treating all farmers and members of the public equally and fairly, facilitating the orderly expansion of production agriculture in Wisconsin, consistent with the legislative intent of the laws. There are approximately 450,000 hogs in Wisconsin, accounting for over \$109 million dollars in cash receipts in 2006.² The number of hogs in Wisconsin has decreased significantly from a high of approximately 2.5 million in 1943.³ A correct application of the siting law is vitally important for the revitalization of the pork industry in Wisconsin.

² 2007 Wisconsin Agricultural Statistics, United States Department of Agriculture, National Agriculture Statistics Service, pp. 4-5.

³ *Id.* at 50.

REASONS FOR REQUEST FOR LEAVE TO FILE AMICUS BRIEF

A. The Amicus Brief of the Ag Coalition Will Assist the Board in Determining Whether a Deficiency or Inconsistency Exists in Roth's Application.

As discussed above, the Ag Coalition and their members have a direct interest in the correct interpretation and application of the livestock siting laws. This includes encouraging the Board to avail itself to the technical assistance of DATCP staff as mandated by the Wisconsin Statutes and the Board's Bylaws.⁴ The appellants have challenged Crawford County's decision contending that Roth's Nutrient Management Plan is deficient and the expansion will have a negative impact upon surface and groundwater. The preliminary decision announced by the Board on April 18, 2008 was based upon a belief that there was an inaccuracy or inconsistency in the Roth application regarding the number of animal units included in the expansion application, ATPC 51 Worksheet 1, compared with those identified through the SNAP Plus nutrient management software. This perceived deficiency involves the interplay of Roth's expansion application, ATPC 51 Worksheet 1, the SNAP Plus program, the requirements of NRCS 590, and the expanded facilities' impact upon surface and groundwater quality. These technical questions require technical expertise to interpret and to answer correctly. The Amicus Brief of the Ag Coalition will provide helpful authority to the Board regarding obtaining technical assistance from DATCP staff who have analyzed Roth's application and submissions. The DATCP staff have technical expertise in interpreting the data generated from utilizing the siting worksheets and SNAP Plus nutrient management software, and can confirm that the Roth application and submissions are indeed complete, accurate and consistent. It would be a travesty to Roth and a major setback to Wisconsin agriculture to reject the Roth expansion application due to a misinterpretation of the information derived from the applicant's appropriate use of the DATCP-mandated worksheets and SNAP Plus nutrient management software. The misunderstanding relating to the calculation of animal units under ATPC 51 Worksheet 1 and the SNAP Plus software can be easily corrected by conferring with DATCP technical staff.

B. The Amicus Brief of the Ag Coalition will Show that Roth's Application was Complete and Accurate.

The Amicus Brief of the Ag Coalition presents a straight-forward substantive analysis of the Roth application and the record developed in Crawford County to show that the application materials were in fact complete and accurate, and encompassed the animal units correlating

⁴ Section 93.90(5)(c), Wis. Stats.; Wisconsin Livestock Facility Siting Review Board Bylaws, Article V.

with actual swine numbers identified in Worksheet 1.⁵ Worksheet 1 calls for swine numbers to be assigned to four categories of swine. SNAP Plus animal unit calculator (Version 1.123.4) (updated version) calls for assignment of swine numbers in five categories of swine. Roth accurately completed both Worksheet 1 and the SNAP Plus software program, assigning the 7,330 swine to the various categories called for on the respective forms. Worksheet 1 calculated 1,703 animal units compared to 1,245⁶ animal unit calculated by SNAP Plus. The Board's preliminary decision rejecting Roth's application and overturning the decision of Crawford County is unfortunately based upon the difference in animal unit calculations derived under Worksheet 1 compared to SNAP Plus covering the same 7,330 swine. The 458 animal unit difference between the calculations under Worksheet 1 and SNAP Plus are discussed, correlated and accounted for in the Ag Coalition's Amicus Brief. It shows that the variance in animal units results from how they are calculated by the respective forms, rather than any inconsistency in Roth's application. The Ag Coalition is confident that its Amicus Brief will provide a useful explanation as to the correlation between the Worksheet 1 animal units and the SNAP Plus data contained in Roth's application, which will be helpful to the Board in reaching a final decision, showing that the application submitted by Roth was complete, accurate, and consistent. Moreover, and most importantly, the difference in animal units derived from Worksheet 1 versus the SNAP Plus software is immaterial to the accurate calculation of animal waste volume in the nutrient management plan which was accurately calculated under both Worksheet 1 and SNAP Plus based upon the actual number of swine in Roth's expansion application rather than interpolated animal units. This basic explanation and understanding of the interplay between Worksheet 1 and SNAP Plus is essential to understanding and assessing important application information which will likely reoccur in subsequent appeals. An accurate evaluation of the record will show that none of the reasons for rejecting an application set forth in the livestock siting laws apply, and that the Board should affirm the Crawford County decision. The Ag Coalition's Amicus Brief does not contain factual information extraneous to the record properly before the Board.

⁵ As discussed in the Amicus Brief, the Board unfortunately reviewed the paper version of Roth's *initial* SNAP Plus worksheet dated August 6, 2007 generated under Version 1.120.1 of the SNAP Plus software. Roth's consultant, Ed Ruff, however, *updated* the SNAP Plus worksheet utilizing Version 1.123.4 which was filed *electronically* with Crawford County on November 21, 2007, with receipt confirmed in Crawford County's letter dated January 23, 2008. It is believed that the Board in reaching its preliminary decision may not have reviewed the updated SNAP Plus report generated under Version 1.123.4 of the software program which is contained in the record in electronic form.

⁶ SNAP Plus calculated 1,340 total animal units. This included 95 beef cattle that, pursuant to ATP 51.011(38), are not shown on Worksheet 1.

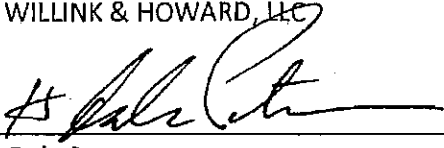
CONCLUSION

The Board should avail itself to DATCP's technical expertise, applied to the record in this case, so that the record and data are accurately assessed. Any misunderstanding of the relationship of the data generated through Worksheet 1 and derived from the SNAP Plus program must be corrected in the interest of basic fairness and justice. The Ag Coalition respectfully requests the Board to grant its request for leave to file an Amicus Brief, and consider the authority and arguments made therein prior to rendering a final decision in this appeal.

Respectfully submitted this 8th day of May, 2008.

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BEFORE THE
LIVESTOCK FACILITY SITING REVIEW BOARD
c/o Wisconsin Department of Agriculture, Trade and Consumer Protection
2811 Agriculture Drive, P.O. Box 8911
Madison, WI 53708-8911

RONALD STADLER, ET AL.

NON-PARTY REQUEST

v.

Docket No. 08-L-01

CRAWFORD COUNTY

NON-PARTY REQUEST OF
DAIRY BUSINESS ASSOCIATION, INC.
TO FILE A BRIEF *AMICUS CURIAE*

Dairy Business Association, Inc. ("DBA") respectfully requests leave from the Livestock Facility Siting Review Board (the "Board") to submit a Brief *Amicus Curiae* in support of the Motion for Reconsideration filed by Howard AV Roth ("Roth") in the above-captioned matter, as allowed by Appendix A, Section B(5) of the Board's Bylaws. This motion is timely per the notice provided by the Board's attorney requesting that all statements of position on Roth's motion be filed by May 9, 2008. As described further below, DBA has a significant interest in the Board developing procedures that further the goals embodied in the Livestock Facility Siting Law and, consequently, has an interest in the outcome of the above-captioned matter. DBA also believes the Board will benefit from DBA's analysis of certain issues pertinent to Roth's Motion for Reconsideration.

DBA is a nonprofit trade association representing milk producers, processors, dairy professionals and associated vendors. DBA's charge, embodied in its mission statement "Keeping the Cows in Wisconsin," is to grow the state's dairy industry and dairy processing infrastructure and preserve Wisconsin as "America's Dairyland." Of DBA's 719 members, 365, or more than half, are dairy farmers and include many expanding operations. According to a recent survey of DBA's farmer members, those members are planning 37 dairy expansion projects, valued at more than \$112 million of investment, during 2008 alone. As such, DBA members have a substantial interest in the proper application of the State's Livestock Facility Siting Law as codified at Wis. Stat. § 93.90 and Wis. Admin. Code ch. ATP 51 (the "Siting Law").

DBA requests leave to file a brief *amicus curiae* in support of Roth's Motion for Reconsideration in order to address procedural issues relating to that Motion that are likely to recur in subsequent matters before the Board. The establishment of proper Board procedures

will further this State's goal of certainty and uniformity in the consideration of livestock facility siting applications. DBA's brief *amicus curiae*, attached to this Request (the "Brief"), addresses certain procedural issues to be considered by the Board, including: the Board's role in reviewing the record below to determine whether the applicant complied with the Siting Law; the procedural implications of interested parties providing position statements to assist the Board in its review; and, the legitimacy of the Board reconsidering a preliminary Board decision premised on a factual error. Board determinations regarding these procedural matters will impact future matters brought before the Board and the rights of DBA members under the Siting Law.

The Brief describes that Roth's original application was completed in full compliance with the requirements of ATCP 51. The Board, in reaching its preliminary decision in this matter, erroneously concluded that Roth's application was internally inconsistent, despite the fact that any alleged or perceived inconsistency was the result of the application of differing animal unit conversion factors and manure generation estimators contained within or resulting from the application materials that Roth was directed to utilize. This situation is likely to recur, and DBA's members have a significant interest in the manner in which the Board corrects its error in this matter.

Also addressed by the Brief is the Board's authority, and responsibility, to correct a preliminary decision based upon factual errors prior to the Board's issuance of a final, written decision. The very purpose of the Siting Law -- to provide certainty and uniformity in siting applications and decisions -- demands that the Board make every effort to ensure that its final decisions are supported by, and based upon, the record before the Board. The Brief dispels various legal arguments that are likely to be raised to suggest the Board should not correct this error prior to issuing its final decision.

Finally, the Brief addresses the Board's power, under the Siting Law and the Board's bylaws, to grant Roth's Motion for Reconsideration. This matter is not a contested case hearing, subject to the provisions of Wis. Stat. § 227.49, and is not a proceeding in which interested parties have an obligation to present every possible legal argument to the Board – particularly when a party could not reasonably anticipate that the Board would labor under a factual error. Review by the Board under the Siting Law is intended to consist of a review of the record below with the goal of determining whether the initial decision was correct. No purpose of the Siting Law is furthered by the Board limiting itself in any way in its attempt to arrive at the correct final decision. DBA members have a significant interest in the Board establishing procedures that will result in the reconsideration of any preliminary decision that is premised on a factual error.

DBA respectfully submits this Request for leave to file with the Board the attached Brief. The Board will benefit from the analysis contained in the Brief as the Board considers Roth's Motion for Reconsideration.

Respectfully submitted this 8th day of May, 2008.

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